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No. 91-424

In The

Supreme Court of the United States

October Term, 1991

KATHY HILLIARD,

Petitioner,

v.

THE CITY AND COUNTY OF DENVER, *et al.*,

Respondents.

Petition For Writ of *Certiorari* To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the issue petitioner has presented is similar to that presented in ***Collins v. Harker Heights,*** No. 90-1279 (1991) (argued November 5, 1991), notwithstanding that ***Collins*** arises in an employment context, where there can be expectations between employer and employee (thus creating a property interest), and the instant case arises where no such expectations have been recognized.

2. Whether petitioner had a clearly established constitutional right to protection by the respondent police officers notwithstanding this Court's declaration in ***DeShaney v. Winnebago County Department of Social Services,*** 489 U.S. 189 (1989), that the Due Process Clause does not create a general duty to protect from harm of third parties.

3. Whether a federal court can find that a state statute requires constitutionally mandated police protection where the state supreme court indicates that such statute does not require protection under state law.

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Respondents, Captain Michael O'Neill, Sergeant Anthony Iacovetta, Sergeant Mary Beth Klee and Officer Sherry Manning, respectfully request that this Court deny the petition for writ of *certiorari*, seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 930 F.2d 1516 (10th Cir. 1991).

COUNTERSTATEMENT OF THE FACTS

This case concerns whether petitioner has a constitutionally mandated right to be taken into police custody (allegedly for her protection) where the police arrested

petitioner's companion (who drove the car in which she was a passenger), left petitioner at an all-night convenience store with $140.00 in her possession, and did not allow petitioner to drive her companion's car because she was too intoxicated to drive. While the trial court found petitioner's right to be taken into custody (under Colorado's emergency commitment statute) was clearly established in this regard, the Tenth Circuit Court of Appeals reversed and found that respondents had qualified immunity to petitioner's claims because petitioner's rights were not clearly established. The City and County of Denver and its police department did not join the appeal below (because they did not claim immunity) and are not before this Court.

Petitioner has represented to this Court that she was intoxicated to a level three to four times over the legal limit for driving in the State of Colorado. *See* petition, p. 4. By doing so, she insinuates that the officers knew of her level of intoxication; however, there is absolutely nothing in the record to suggest such knowledge on the part of the officers. Petitioner never alleged in her complaint that she exhibited any signs of such a level of intoxication; she merely alleged that she was "in a highly intoxicated condition." Although it is undisputed that the officers determined petitioner to be too intoxicated to drive the vehicle, the officers made no further determination.

It was also undisputed that petitioner's companion, the driver of the vehicle, handed her approximately $140.00 and told her to call his friends to bail him out of jail. Thereafter, petitioner attempted to make several phone calls for assistance at a convenience store, which

was open and accessible to her all night as a safe haven in the alleged high-crime district.

REASONS WHY THE PETITION SHOULD BE DENIED

1. ISSUE NO. 1 PRESENTED HEREIN IS DISTINGUISHABLE FROM THE ISSUE IN *COLLINS V. HARKER HEIGHTS*, NO. 90-1279.

Petitioner argues that this Court should grant *certiorari* because the first issue submitted herein is similar to that in ***Collins v. Harker Heights,*** No. 90-1279 (argued November 5, 1991), where this Court accepted *certiorari* over the following issue (the second issue presented):

> Does Texas Hazard Communication Act, which requires all Texas employers (including municipalities) to inform and train their employees concerning workplace safety and to provide appropriate personnel protective equipment, create substantive due process liberty interest or "entitlement" to be free from very workplace hazards to which estate's decedent succumbed?

The issue in ***Collins*** is clearly distinguishable from the issue herein because ***Collins*** arises in an employment context where this Court has previously recognized that understandings between an employer and an employee may constitute an entitlement to benefits which may ripen into a constitutionally protected interest. *See, e.g.*, ***Cleveland Board of Education v. Loudermill,*** 470 U.S. 532, 538 (1985); and ***Board of Regents of State Colleges v. Roth,*** 408 U.S. 504, 576-78 (1972). However, in the instant

case, petitioner bases her constitutionally protected interest upon Colorado's emergency commitment statute (reprinted in petitioner's appendix[1]) designed merely to allow police to take into protective custody an intoxicated person who is "clearly dangerous to the health and safety of himself or others."[2] ***See Leake v. Cain,*** 720 P.2d 152, 162 (Colo. 1986) (this statute did not create a duty to take into custody an intoxicated teenager, whom the police released to the custody of his younger brother, and who subsequently began driving and caused the death of plaintiffs' decedents).

This case is easily distinguishable from the issue in ***Collins*** because petitioner cannot claim to have an "expectation" under ***Roth*** to be taken into protective custody under Colorado's statute; indeed, she made no allegation that she even knew of the statute prior to the

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[1] The pertinent part of this statute, C.R.S. § 25-1-310(1), reads as follows:

> When any person is intoxicated or incapacitated by alcohol and clearly dangerous to the health and safety of himself or others, such person shall be taken into protective custody by law enforcement authorities or an emergency service patrol, acting with probable cause, and placed in an approved treatment facility. . . .

[2] There was no allegation in the complaint that petitioner was clearly dangerous to herself; indeed, there was not even an allegation that her intoxication caused the assailant to injure her, *i.e.*, there is no allegation that she would not have been assaulted if she had been sober. Therefore, even if Colorado's emergency commitment statute created a constitutional right to protection, petitioner did not allege the necessary facts to trigger the protection of the statute.

incident. Petitioner has submitted no law to this Court as a basis for claiming an "expectation" to affirmative action by the police based upon a statute of which she was not aware at the time of the incident. Clearly, she seeks herein merely to constitutionalize a state statute where that statute does not create "an implied cause of action for damages." *See Hilliard v. City and County of Denver,* 930 F.2d 1516, 1519 (10th Cir. 1991), and *Leake,* 720 P.2d at 162-63.[3] Thus, even if the officers violated the state statute, because the state statute does not establish the cause of action, a violation of it is irrelevant to the federal immunity inquiry herein because "[n]either federal nor state officials lose their immunity by violating the clear command of a statute or regulation – of federal or of state law – unless that statute or regulation provides the basis for the cause of action sued upon." *See Davis v. Scherer,* 468 U.S. 183, 194 n.12 (1984).

In short, there is no similarity between the instant case and *Collier.*

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[3] The *Leake* court held that "in our view, the General Assembly did not intend to create a claim for relief against police officers who, in their discretion, release an intoxicated person into the 'custody' of an apparently sober and responsive relative." *Leake,* 720 P.2d at 162-63. This is directly analogous to the instant case where the police "released" petitioner to the protection afforded by an all-night convenience store where she had access to a telephone to call friends or a taxi given the fact that she had $140.00 on her person.

2. ANY CONFLICT AMONG THE CIRCUITS HAS BEEN RESOLVED BY *DESHANEY*.

Petitioner contends that the decision of the Tenth Circuit is in conflict with both ***White v. Rochford,*** 592 F.2d 381 (7th Cir. 1979), and ***Wood v. Ostrander,*** 879 F.2d 583 (9th Cir. 1989), ***cert. denied, Ostrander v. Wood,*** 111 S.Ct. 341 (1990).

The issue decided below concerned solely whether the rights of petitioner were clearly established at the time of the incident. This Court has already addressed and resolved this issue in ***DeShaney v. Winnebago County Department of Social Services,*** 489 U.S. 189, 194 (1989), where it granted ***certiorari***

> because of the inconsistent approaches taken by the lower courts in determining when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights. . . .

That is, the "inconsistent approaches taken by the lower courts" demonstrate that the right to protection was not clearly established.

DeShaney considered the following facts: a child had been taken from his home by an employee of a department of social services and then returned to his father. Notwithstanding knowledge by the department that the four-year old child subsequently suffered repeated suspicious injuries to his head, indicating abuse, the department allowed the father to retain custody over the child.

The father's abuse eventually caused the child's profound retardation. However, this Court found that the child had no right under the Constitution to be protected from his father under these circumstances. Thus, the dispositive facts in ***DeShaney*** are indistinguishable from the facts herein because in both cases (1) the injured person had been under some type of state "control" but was injured after being released from state control,[4] (2) the State could be said to have placed the person in a position of danger,[5] and (3) a third party not under the control of the State caused the injury.

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[4] Obviously, the state control in the instant case is extremely weak because it consists solely of the officers' decision not to let petitioner drive her companion's car.

[5] Petitioner places great emphasis on allegations that the officers put her in a position of danger. ***See,*** petition, p. 16. Although this argument may have some validity in tort analysis, it is irrelevant to an analysis of one's constitutional rights. First, the risk of a sexual assault in the instant case is, as a matter of law, less likely than the risk of continued child abuse, already known to have occurred, in ***DeShaney;*** thus, under the reasoning set forth in ***DeShaney,*** the alleged risk of injury is irrelevant. Second, the officers did not create any danger where petitioner clearly had a sanctuary but chose not to use it. Third, the "danger," if it can be called that, was created by petitioner's companion who drove his car while intoxicated and by petitioner herself who rode in the car while intoxicated; clearly, the officers are under a duty to keep intoxicated people from driving and there is no creation of a danger, in a constitutional sense, under such facts. Fourth, and finally, if the officers are under a duty in a constitutional sense to protect petitioner, then they would be under a duty to protect anybody who requests protection in a high crime area. This "duty" would be unprecedented and would severely restrict the officer's time to do his other, time-consuming tasks. In short, simply because an officer lives in a world of crime, he cannot be asked to be liable in money damages for failing to protect citizens from crime.

Petitioner essentially claims that this Court should accept *certiorari* over whether an alleged "special relationship" between petitioner and the officers herein can create a constitutionally protected interest. *See* petition, p. 13. This Court in *DeShaney* specifically rejected this argument. *DeShaney,* 489 U.S. at 197-98 ("Petitioners contend, however, that . . . such a duty may arise out of certain 'special relationships' created or assumed by the State with respect to particular individuals. * * * We reject this argument"). Instead, this Court recognized that an affirmative duty of care and protection arises only when the State has taken a particular individual into custody, thus depriving that individual of an opportunity to care for or protect himself: "Taken together, [the cases establishing an affirmative duty to care or protect] stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.,* at 199-200. However, once a person is released from the custody of the State, there is no further "constitutional duty" to care for or to protect that person especially where, as here, that person was never taken into custody, and had $140.00 in her possession, access to a telephone, a sanctuary of an all-night convenience store, and directions from her male companion to call his friends. Thus, the so-called "special relationship" rule is irrelevant to a constitutional injury, although it may have some bearing on state tort analysis. *See, e.g., Leake,* 720 P.2d at 160.

It is plain that because petitioner had been released from police custody at the time of her injury, she can claim no ***clearly established*** constitutional deprivation:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power or employing it as an instrument of oppression" [citations omitted]. Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.
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> As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

DeShaney, 489 U.S. at 195-96 and 197. Thus, any purported conflict within the circuits has been resolved by ***DeShaney.***

3. THERE IS NO BASIS FOR A FEDERAL COURT TO DETERMINE THAT THE COLORADO STATUTE CREATES A DUE PROCESS INTEREST.

Section III of the petition restates the argument that the instant case is similar to that in ***Collins,*** that is, a Colorado state statute creates an affirmative duty to protect petitioner. This argument is indistinguishable from the argument in Section I, ***infra.*** In order for a federal court to find a due process right implicated herein, the federal court must turn to "understandings that stem from an independent source such as state law. . . . " ***Roth,*** 408 U.S. at 577. Because the Colorado Supreme Court has already indicated that this statute does not create a tort cause of action, ***Leake,*** 720 P.2d at 162-63, it would be inappropriate for a federal court to find such an "understanding" under state law in direct conflict with the state's highest court.

CONCLUSION

For these reasons, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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